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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1316

GEORGE V. AYLWARD, JR., TRUSTEE IN BANKRUPTCY OF RIVIERA CLUB, INC., d/b/a CABARET RIVIERA, BANKRUPT,
Petitioner,

vs.

BROADWAY VALENTINE CENTER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. .....

GEORGE V. AYLWARD, JR., TRUSTEE IN BANKRUPTCY OF RIVIERA CLUB, INC., d/b/a CABARET RIVIERA, BANKRUPT,
Petitioner,

vs.

BROADWAY VALENTINE CENTER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, George V. Aylward, Jr., Trustee In Bankruptcy of Riviera Club, Inc., d/b/a Cabaret Riviera, Bankrupt, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered in appeal numbered 18,778 wherein petitioner was appellant and Broadway

Valentine Center, Inc., was appellee and in (cross) appeal numbered 18,786 wherein Broadway Valentine Center, Inc., was appellant and petitioner was appellee, in which the Court of Appeals affirmed the judgment of the United States District Court. Said District Court affirmed in part and reversed in part the Referee's turnover order directed to Broadway Valentine Center, Inc.

The Trustee (appellant in 18778 and appellee in 18786) is herein referred to as "petitioner" and Broadway Valentine Center, Inc., (appellee in 18778 and appellant in 18786) is herein referenced as "respondent."

OPINIONS BELOW

The Referee's Statement of the Pleadings, Findings of Fact, Conclusions of Law and Order on Claims Filed by Broadway Valentine Center, Inc., and on Trustee's Petition for Order to Show Cause, entered May 12, 1964 (R. 124-136), excluding the Findings of Fact and Conclusions of Law (R. 127-136) is appended hereto (Appendix pp. A47 to A50). The Referee's Findings of Fact and Conclusions of Law (R. 127-136) are set out *in haec verba* in the District Court's Judgment (R. 150-158) and are not set out here to avoid repetition.

The (District Court's) Judgment on Petition for Review Affirming in Part and Reversing in Part Orders of the Referee in Bankruptcy was entered on January 24, 1967 (R. 145-169), mistakes therein were corrected by the District Court on February 3 and 7, 1967 (R. 169-186). Said Judgment, as corrected, is appended hereto (Appendix, pp. A5 to A46). The Referee's Findings of Fact and Conclusions of Law made on May 12, 1964 (R. 127-136), mentioned supra, are set out verbatim in the District Court's Judgment entered January 24, 1967 (R. 150-158; Appendix pp. A11 to A19).

The Per Curiam Opinion and Judgment of the Court of Appeals dated and entered February 5, 1968 (R. Proc. in C.A. pp. 1-6), has not been officially reported; a copy thereof is appended herein (Appendix, pp. A1 to A5).

STATEMENT OF JURISDICTION

The Per Curiam Opinion and Judgment of the Court of Appeals is dated and was entered on February 5, 1968 (R. Proc. in C.A. pp. 1-6; Appendix, pp. A1 to A5). Petitions for Rehearing on appeals 18778 and 18786 (R. Proc. in C.A. pp. 7-18) were denied by the Court of Appeals on March 1, 1968 (R. Proc. in C.A. p. 19). The Order Staying Issuance of Mandate Pending Certiorari Proceedings in Supreme Court, U. S., for a period of 30 days from and after March 7, 1968, was made and entered by the Court of Appeals on March 7, 1968 (R. Proc. in C.A. p. 20).

This Court's jurisdiction is invoked under 28 U.S.C.A., Section 1254 and 11 U.S.C.A., Section 47.

QUESTIONS PRESENTED FOR REVIEW

I

(a) Did the Court of Appeals err in overlooking and failing to consider and follow controlling Missouri law applicable to the facts at bar? Said facts are that: bankrupt was adjudicated and petitioner was appointed Receiver of bankrupt's assets on December 27, 1961 (R. 192); petitioner contemplated immediate sale of bankrupt's assets located in bankrupt's premises; shortly *after* the adjudication and prior to the expiration of the 60 day period mentioned in Section 70(b) of the Bankruptcy Act (11 U.S.C.A., Sec. 110 (b)—1952), at respondent's instance and request, petitioner and respondent entered into an oral agreement (R. 58-67) whereby petitioner agreed not to

sell bankrupt's assets located in the premises leased to bankrupt *immediately*, as petitioner had intended (R. 58-67) and agreed to keep such assets intact in said leased premises until a tenant, acceptable to respondent, could be found for such premises who could use such assets intact as there installed in operating a night club therein as bankrupt had done (R. 42, 43, 58-63); performance of said agreement required "time" and involved the possibility of petitioner incurring substantial rent charges incident to holding and possessing the leased premises under the agreement (R. 61) by reason of which petitioner requested the required "time to do this" and respondent granted petitioner "time to do this" (R. 43). "This" was time to sell bankrupt's property located in the leased premises intact for use as a going business pursuant to respondent's request to a purchaser who was acceptable to respondent as a tenant (R. 43, 59, 60) at which time respondent would accept the surrender of the leased premises and would retake possession thereof. Accordingly petitioner (receiver and trustee) held the leased premises under the lease, rent free, after bankruptcy pursuant to the agreement resulting from said conversations and petitioner told that to respondent (R. 63; Court of Appeals op. Appendix pp. A3, A5; District Court op. Appendix pp. A27, A28). In March 1962, respondent found the desired tenant, notified petitioner thereof, and, in accordance with the agreement, petitioner *then* advertised the sale of bankrupt's assets located in the leased premises; on March 19, 1962, petitioner sold same intact as installed therein to respondent's desired tenant who was the highest bidder therefor (R. 59, 60, 62, 53); and on said date surrendered the leased premises to respondent, who accepted the surrender thereof and *then* respondent leased the premises to said tenant who took possession thereof and operated a night club therein as bankrupt had done (R. 62, 63, 51-53).

Performance of said agreement by the parties thereto was completed on March 19, 1962, which was *after* February 25, 1962, the expiration date of the 60 day period mentioned in Section 70(b) cited supra, although the agreement, itself, was made *prior* to such expiration date.

The Missouri law controlled as to the existence of a surrender of the leased premises. *Hotz* v. *Federal Reserve Bank of Kansas City,* 108 F. 2d 216, 218, 219 (C.A. 8). *Huling* v. *Roll,* 43 Mo. App. 234, 238-240, deals with *acts* constituting a surrender; *Hutchinson* v. *Jones,* 79 Mo. 496, holds that if the acts of the parties are such as a surrender is implied, then it exists in spite of the intention of the parties; *Tobener* v. *Miller,* 68 Mo. App. 569, 571, and *Wahl* v. *Hinchey,* 72 S. W. 2d 497, 499, pars. 3, 4, 5 (Mo. App.) hold that when an oral agreement *for* a surrender "has been *acted upon* and *performed,* there arose a surrender *by operation of law* and plaintiff was thereafter estopped from claiming any longer under the lease."

The Referee ordered respondent to turn over the $6000.00 lease deposit at bar to petitioner (R. 136); the District Court and Court of Appeals erred in reversing the Referee. That the Referee ruled properly is established by *Von Schleinitz* v. *North Hotel Co.,* 323 Mo. 1110, 23 S. W. 2d 64, 74, par. 1; *Ten-Six Olive, Inc.,* v. *Curby,* 208 F. 2d 117, 121, 122, par. 5 (C.A. 8); *In re Barnett,* 12 F. 2d 70, 72 (D. C. N. Y.), affirmed 12 F. 2d 73, 79 (C.A. 2); *Floro Realty & Investment Co.* v. *Steem Electric Corporation,* 128 F. 2d 338, 341, 342 (C.A. 8).

(b) Did respondent waive all rights accorded it under Section 70 (b) by its conduct in inducing petitioner to make the aforementioned surrender agreement; by its acceptance of the benefits thereof upon petitioner's performance thereunder; by granting petitioner the "time"

necessary and required for performance thereof and the possession of the leased premises rent free to petitioner; by respondent's acceptance of the surrender of the leased premises when it found the desired tenant; and by its making a new lease with such tenant; and did the Court of Appeals err in not ruling so? The Court of Appeals overlooked *Ten-Six Olive, Inc.* v. *Curby*, 208 F. 2d 117, 123, 124 (C.A. 8) where that court ruled:

> "the 60 day limitation period of Section 70, sub. b, was also inserted in the statute for the benefit of the lessor. (Citing). We can see no reason why the lessor may not also waive the right accorded him by the terms of this statute. * * * Since appellant did not want to treat the lease as having been terminated either by its terms or by the bankruptcy statute, but chose to acknowledge the continued existence of it, *it (respondent) must be deemed to have waived its right to have it (the lease) terminated and to have become bound by its (respondent's) course of conduct.*" (Parentheses added)

Supporting the *Ten-Six Olive* case is *In re Sound, Inc.*, 171 F. 2d 253, 254 (C.A. 7), certiorari denied sub nom. *Atwell Bldg. Corp.* v. *Sound, Inc.*, 336 U. S. 962, 69 S. Ct. 892, 93 L. Ed. 1114; and *Entin* v. *Stevens, Tr.*, 323 F. 2d 894, 898, pars. 1, 2, 899 (C.A. 8); and *Larkins* v. *Sills, Tr.*, 377 F. 2d 1, 3 pars. 4, 5, 6, (C.A. 5).

(c). Did the Court of Appeals err in not ruling that respondent also waived its right to require compliance with the lease provisions themselves under the facts set forth in Questions Presented I(a)? *Larkin* v. *Sills, Tr.*, 377 F. 2d 1, 3, par. 5 (C.A. 5); *Davidson* v. *Shivitz*, 354 F. 2d 946, 948, pars. 1, 2, 3 (C.A. 2); *Speare et al.* v. *Consolidated Assets Corporation*, 360 F. 2d 882, 887, pars. 4-6 (C.A. 2); *Ten-Six Olive Inc.*, v. *Curby*, cited supra, where the Court said (pars. 11-13): "Under the provisions of the lease,

appellant (respondent) had the option to terminate the lease if lessee became insolvent or bankrupt. It chose not to do so. Forfeiture provisions are inserted in leases for the benefit of the landlord and may be waived (citing)"; and *4 Collier on Bankruptcy* (14th Ed.), Sec. 70.44, pp. 1371, 1372, note 13.

(d) Did the Court of Appeals err in agreeing with the District Court's determination (Appendix p. A3) "that the referee was in error in finding an agreed surrender of the subleased real estate (called lease herein) on or before March 19, 1962"? (R. 156, p. 6, R. 153-155, par. 10, Appendix pp. A17, A18, A14). Said affirmance of the District Court's decision by the Court of Appeals not only conflicts with the findings of fact made by the Referee (cited supra) but also with the findings made by the District Court (Appendix pp. A27, A28) set out infra and with the findings of the Court of Appeals itself in the instant decision (Appendix pp. A3, A5) set out infra. It also conflicts with the Stipulation of the parties, filed June 19, 1963 (R. 100-119, 101) set out infra; with the respondent's several admissions and acknowledgments that *the lease terminated on March 19, 1962* (R. 14, 101, 113) set out infra; and with the respondent's conduct in inducing petitioner to change his position as to immediate sale and to make the surrender agreement at bar, which bound respondent, set out supra (Questions Presented I-a).

The District Court's Findings of Fact
(Appendix pp. A27 to A28).

Under heading "Validity of the Order Denying Claim For Rent After Bankruptcy" (R. 166, 167, Appendix pp. A27 to A28) the District Court finds:

(R. 166) "The receiver and trustee (petitioner) exacted an agreement to permit the occupancy of the premises

including storage of the bankrupt's property without obligation for rent as an administrative expense." "The claimant (respondent) *agreed* to this in the mutual interest of the receiver and trustee and claimant to bargain for sale of the personalty and for securing a new tenant while the properties were intact. (Referee's) Findings of Fact 9 and 10." "These facts support the Referee's conclusion of law No. 6 denying the claim for rental after bankruptcy as administrative expense." "They also explain the continued possession of the trustee until May 19, 1962 (March 19 intended) and the making of the new sublease thereafter".

(R. 167) *"It is concluded that the findings of fact of the Referee that claimant (respondent) agreed to permit occupancy of the premises after bankruptcy without charge to the trustee (petitioner) is supported by substantial evidence and not erroneous in any degree."* (Italics and parentheses furnished).

The Court of Appeals' Findings of Fact
(Appendix A3, A5).

On page 3 of said opinion (Appendix, p. A3) the Court of Appeals finds: that petitioner was in possession of bankrupt's premises from December 28, 1961, until March 19, 1962; that "The bankruptcy referee found that the parties (petitioner and respondent) *had agreed* to suspend the rent during the above period of time (December 28, 1961 to March 19, 1962)"; and that "The District Court concluded that this finding was supported by substantial evidence and not erroneous in any degree." (Italics furnished).

On page 5 of said opinion (Appendix, p. A5), the Court of Appeals finds: that "There is ample support in the evidence for the District Court's finding that Broadway (respondent) *agreed* to permit the receiver-trustee (petitioner)

to occupy the subleased premises *after* the date of bankruptcy without obligation for rent as an administrative expense" (parentheses and italics ours); that "The record shows that the receiver was interested in selling the bankrupt's assets located in the subleased premises as soon as he could and at the best possible price, and that Broadway (respondent) desired to relet the premises intact to someone who would operate a night club therein". In note (3), on said page 5, the Court of Appeals finds: that "the record indicates both parties (petitioner and respondent) achieved their immediate goals because the purchaser at the March 19, 1962, sale of the bankrupt's assets was the next tenant of the premises and for a time did operate a night club therein".

Respondent's Stipulation and Acknowledgments (R. 14, 101, 113).

In respondent's Landlord's Claim, filed May 11, 1962 (R. 11-14), respondent twice expressly admits and acknowledges (R. 14) that said claim for rent and expenses *after* bankruptcy, from December 28, 1961, through March 19, 1962, was *"Allocation to termination of lease March 19, 1962"*.

In the "Stipulation" filed June 19, 1963 (R. 100-119); it is agreed (R. 101) that petitioner "took possession of the premises on December 28, 1961, and remained in possession thereof until March 19, 1962, at which time *the premises were surrendered to and retaken by Broadway Valentine Center, Inc., (respondent)*" (italics ours); and that "Said Trustee (petitioner) had the exclusive right to possession of all bankrupt's assets and property as of the date of said adjudication". Attached to said Stipulation is respondent's "Statement Of Account—December 28, 1961, through March

19, 1962", for rent and expenses during the stated period (Exhibit 3, R. 113) in which respondent again twice repeats the admission that said account is "*Allocation to termination of lease March 19, 1962.*"

Respondent's Conduct (R. 42, 43, 51-53, 58-67).

Respondent's conduct and the result thereof is set out in Questions Presented I(a). Respondent's witness, Clark S. Rhoden, its vice-president, did not negotiate the surrender agreement for respondent (R. 43, 44, 51), did not know whether his father, E. C. Rhoden, Sr., respondent's president, or James Britt, respondent's attorney, dealt with petitioner as to the leased premises and the rent (R. 47, 52, 38, 58-67).

The facts stated in Questions Presented I(a) hereof and in this subdivision I(d) are uncontroverted and undisputed since neither E. C. Rhoden, Sr., nor James Britt, respondent's attorney who negotiated the surrender agreement with petitioner, testified and also by reason of respondent's admissions in the aforementioned stipulation and in its aforesaid claims. Britt directed petitioner to send prospective purchasers to Rhoden, respondent's vice-president, for acceptance as a tenant and not to him (Britt) (R. 65).

From the foregoing and under the Missouri law, cited supra, there was a valid surrender of the leased premises on March 19, 1962, by agreement and operation of law. The District Court and the Court of Appeals erred in not affirming the Referee's finding and conclusion that the leased premises were surrendered per the agreement (R. 153, 154, par. 10, R. 156, par. 6, Appendix, pp. A14, A17, A18).

(e) Did the Court of Appeals err in considering and ruling that, notwithstanding the agreement and the foregoing facts, there was an automatic rejection of the lease

under Section 70(b) after respondent induced petitioner (R. 58-67) to forego an immediate sale as was intended and to enter into the instant surrender agreement at respondent's instance and request; and after petitioner had fully performed said agreement and respondent had received the full benefits to be derived from such performance (Appendix, p. A-5, Note 3)?

In *Dickerson* v. *Colgrove*, 100 U.S. 578, 580, 25 L. Ed. 618, the United States Supreme Court says:

> "The estoppel here relied upon is known as equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who, by his *language* or *conduct*, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Such a change of position is sternly forbidden* * * *. This remedy is always so applied as to promote the ends of justice." (Italics ours).

In support of the *Dickerson* case is *DeMoss* v. *Economy Furniture & Carpet Company*, 74 Mo. App. 117, 122-124 and *Bank of America, etc.*, v. *Smith*, 336 F. 2d 528, 529 (C.A. 9).

II.

Did the Court of Appeals err in holding (Appendix, p. A4) that "The District Court correctly found that the landlord-tenant relationship in the case at bar terminated by operation of law sixty days after the bankruptcy or on February 25, 1962"; and in approving Chief Judge Becker's statement, quoted infra (which erroneously applied *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433, 444, 57 S. Ct. 292, to the case at bar), to the effect that: "The landlord's voluntary re-entry after rejection of the unexpired sublease by the trustee of the bankrupt tenant is not a surrender of the sublease which affects the landlord's claim for unpaid future rent"?

(a) The first quoted excerpt speaks of a *rejection* of the lease under section 70(b) by operation of law. There was no *rejection* at bar; respondent waived the right accorded it by said section and in lieu entered into an independent agreement with petitioner (not the bankrupt) for a *surrender* of the leased premises upon terms, stated supra, under which petitioner retained possession of the leased premises, rent free, until performance of the surrender agreement. *Entin* v. *Stevens, Trustee,* 323 F. 2d 894, 899, par. 3 (C.A. 8). In *Bank of America, etc.,* v. *Smith, Tr., etc.,* 336 F. 2d 528, 529, par. 1 (C.A. 9), the court rules that rejection under section 70(b) does not terminate the landlord-tenant relationship. To same effect is *4 Collier on Bankruptcy,* Sec. 70.43, pp. 1353, 1354.

(b) The second quoted excerpt (supra) erroneously applies the *City Bank* case (a corporate reorganization proceeding under section 77 B of the Bankruptcy Act) to the ordinary bankruptcy proceeding at bar. Section 77 B has special provisions (set out in said *City Bank* case—pp. 438-443) applicable only to 77 B proceedings, which provide for the allowance of the landlord's claim for unpaid future rent even though there was a rejection by operation of law or otherwise which provisions in Section 77 B are not applicable to ordinary bankruptcy proceedings as that at bar. Such is the sole and only meaning of Judge Becker's statement, quoted supra; said statement is not applicable at bar. In *City Bank* (l. c. 443, pars. 8, 9) the Supreme Court says: "The question for decision in this case is whether the claim recognized by section 77-B, which would not have been an enforceable demand at common law, or under the laws of many of the states, is allowable only if the leasehold estate has not, after rejection of the lease, been drowned by surrender effective under state law or otherwise terminated pursuant to state law by lessor's conduct". *Consoli-*

dated Gas, E. L. & P. Co. v. *United Ry. & Electric Co.*, 85 F. 2d 799, 805, pars. 6, 7 (C.A. 4), cert. denied, 300 U. S. 663, 81 L. Ed. 871, 57 S. Ct. 483, sets out the distinction between ordinary bankruptcy proceedings and corporate reorganization proceedings under section 77-B. *Texas Importing Company, Ltd.*, v. *Banco Popular, etc.*, 360 F. 2d 582, 584, par. 3 (C.A. 5), and *Entin* v. *Stevens, Trustee*, 323 F. 2d 894, 898, 899, pars. 1-3 (C.A. 8), and *Title Insurance & Guaranty Co.* v. *Hart*, 160 F. 2d 961, 965, par. 1, 966 (C.A. 9), cert. den. 332 U. S. 761, 92 L. Ed. 347, 68 S. Ct. 64, hold that Section 70(b) cannot apply to corporate reorganizations.

In the *Title Insurance* case, cited supra (l. c. 966), the court said: "that the assumption, rejection, and automatic rejection provisions of Section 70, sub. b, are inconsistent with and inapplicable to Chapter X, reorganization proceedings". Section 77 B is Chapter X's predecessor, *11 Remington on Bankruptcy (Hayes)*, Section 4395, page 88.

(c) On page four (Appendix, p. A 4), the Court of Appeals erred by construing the language of the instant lease provisions as though respondent was claiming under the lease and said lease had not been extinguished by the surrender, relying upon *Zaconik* v. *McKee*, 310 F. 2d 12 (C.A. 5), *Burns Trading Co.* v. *Welborn*, 81 F. 2d 691 (C.A. 10), and *Sline Properties, Inc.*, v. *Colvin*, 190 F. 2d 401 (C.A. 4) (R. 158, 159).

In the *Zaconik, Burns* and *Sline* cases the landlord elected to act *under the lease provisions* and thereby the court was required to construe the language of the lease according to the particular state's law; there was no independent surrender agreement which extinguished the lease as at bar.

STATUTES AND RULES INVOLVED

Section 70(b) of The Bankruptcy Act (11 U.S.C.A., Sec. 110)—Title to Property (Prior to September 25, 1962, Amendment), provides:

> "(b) Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property; Provided, however, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected * * *".

STATEMENT OF THE CASE

On December 27, 1961, the bankruptcy proceedings of Riviera Club, Inc., a Missouri corporation, respondent, was referred to the Referee in Bankruptcy; petitioner George V. Aylward, Jr., was appointed Receiver (R. 192).

Shortly thereafter, at respondent's instance and request (R. 58-67), petitioner and respondent entered into the oral agreement under the circumstances set out, supra, in Questions Presented I subdivisions (a) and (d). Upon performance of said agreement by both parties (Per Curiam op., Appendix p. A5, note 3) and on March 5, 1962, the Referee ordered that the sale of bankrupt's assets be held on March 17, 1962; that it be reported to the court on March 19, 1962; and that asserted lien claims be transferred to the proceeds of the sale (R. 7-9). The sale was held on March 17, was reported to and was confirmed by the Referee on March 19, 1962 (R. 9-11).

On March 5, 1962, also, petitioner became the Trustee in these proceedings (R. 193).

On May 11, 1962, respondent filed Landlord's claim (R. 11-14) asserting therein that the Receiver and Trustee occupied the leased premises *after* bankruptcy by reason of which bankrupt's estate owed rent and expenses as costs of administration (R. 12, pars. 2-5). In the Statement of Account attached thereto (R. 13, 14), respondent prorates the rent and expenses *after* bankruptcy to March 19, 1962, stating that said proration is *"Allocation to termination of lease March 19, 1962"* (R. 14).

On May 11, 1962, respondent also filed an unsecured claim ($1,865.73) for rent and expenses *prior* to bankruptcy (R. 194). Said claim was made a secured claim by amendment filed June 26, 1962 (R. 14-16).

On October 26, 1962, petitioner filed objections to allowance of respondent's said claims and also filed a petition for an order directing respondent to show cause why it should not turn over to petitioner the $6,000.00 lease deposits made under lease dated April 28, 1961 (R. 17-21); the order to show cause was made (R. 22). On January 31, 1963, respondent filed Response and Setoff thereto (R. 23-25).

On April 8, 1963, petitioner filed amended objections and amended petition for order to show cause (R. 25-31) in which petitioner asserted that bankrupt's estate is not indebted to respondent for rent and expenses *after* bankruptcy (R. 28, par. b); that petitioner and respondent made an agreement under which respondent, as lessor, re-entered and took possession of the leased premises and re-leased the same to another tenant and that petitioner was not liable for rent from the date of adjudication to the date of sale on March 19, 1962 (R. 26, par. 1; R. 28, pars. 5, 6, 7) and that petitioner and respondent had fully performed said agreement (R. 29, par. 6).

Respondent filed no response to petitioner's amended pleadings prior to the Referee's hearing by reason of which at said hearing both parties orally stated the issues to the Referee in the absence of any response by respondent to petitioner's said amended pleadings (R. 32, 33).

The issues thus stated were submitted to the Referee on oral evidence presented on June 18, 1963 (R. 31-100) and on written Stipulation filed June 19, 1963 (R. 100-119).

On November 14, 1963, after the Referee's hearing, respondent filed Amended Response and Setoff (R. 121-124) to petitioner's April 8, 1963, amended pleadings in which respondent denied making said agreement and in the alternative, states: "that any such agreement was without consideration, violative of the Statute of Frauds, void and of no legal effect" (R. 121).

On May 24, 1964, the Referee ruled said issues (R. 124-136). Respondent was ordered to turn over said $6,000.00 lease deposit to petitioner; was allowed a general claim for rent *prior* to bankruptcy conditioned on the payment of said lease deposit to petitioner as directed; was denied its claim for rent and expenses *after* bankruptcy; and was denied its claimed setoff (R. 136).

On July 10, 1964, respondent petitioned for the review of the Referee's order dated May 24, 1964 (R. 137-141). The review was certified to the District Court on December 14, 1964 (R. 141-144).

On January 24, 1967, the District Court ruled said review by Judgment on Petition for Review Affirming in Part and Reversing in Part Orders of the Referee in Bankruptcy (R. 145-169). Mistakes in said judgment were corrected on February 3 and 7, 1967 (R. 169-186).

Appeals were taken to the Court of Appeal (8th Cir.) on February 14, 1967 (R. 187-191).

On February 5, 1968, the Court of Appeals (8th Cir.) by its opinion and judgment affirmed the District Court (R. Proc. in C.A. pp. 1-6; Appendix pp. A1-A5).

On February 26, 1968, Petitions for Rehearing were filed which the Court of Appeals denied on March 1, 1968 (R. Proc. in C.A. pp. 7-19). On March 7, 1968, the Court of Appeals made its Order Staying Issuance of Mandate Pending Certiorari Proceedings in Supreme Court, U. S. on petitioner's Motions to Stay Issuance of Mandate, filed March 6, 1968 (R. Proc. in C.A. p. 20).

The facts set forth in Questions Presented I(a) and (d) are undisputed and uncontroverted by reason of the supporting findings made by the District Court and by the Court of Appeals; of the respondent's admissions by Stipulation that *there was a surrender* and of other admissions set out in respondent's aforesaid claims to the effect that *the lease at bar terminated on March 19, 1962, the date of the sale of bankrupt's assets and of petitioner's surrender of the leased premises to respondent* (Questions Presented I(d)), and by reason of the fact that E. C. Rhoden, Sr., respondent's president, and James Britt, respondent's attorney, who negotiated the surrender agreement made with petitioner (R. 58) failed to testify, all of which made the entire presentation to the Referee uncontroverted and undisputed in the face of the testimony of Clark S. Rhoden, respondent's vice president, that he did not negotiate the instant agreement for respondent (R. 43, 44, 51) and did not know whether his father, E. C. Rhoden, Sr., respondent's president or James Britt, respondent's attorney dealt with petitioner as to the leased premises or the rent (R. 47, 52, 38, 58-67). Said

presentation, submitted to the Referee as set forth in Questions Presented I(a) and (d), is made part of this statement by reference.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The principle involved at bar is of great importance to the enforcement of the general public's rights and liabilities with respect to a "surrender" of leased premises and the effect thereof under the Missouri law. In the instant case the Court of Appeals decided an important question of Missouri law in a way in conflict with and in disregard of applicable Missouri law, cited with attendant facts in Questions Presented I(a) through (e), set out supra.

2. The principle here involved is of great importance to the rights and liabilities of the general public and of general creditors in any and all bankruptcy proceedings with respect to assumption or rejection of executory contracts, including unexpired leases of real property under Section 70(b) of the Bankruptcy Act, in that under said section such contracts and unexpired leases "give rise to liabilities that are a paramount charge against the bankrupt estate as well as creates benefits, the former may outweigh the latter to the detriment of the estate and particularly the general creditors whose interests the trustee is primarily obliged to protect." *Bank of America, etc.* v. *Smith, Trustee, etc.*, 336 F. 2d 528, 529, par. 1 (C.A. 9).

In disregard of the importance of the foregoing statement the Court of Appeals has decided the federal question at bar in a way in conflict with this court's decision in *Dickerson* v. *Colgrave*, 100 U.S. 578, 580, 25 L. Ed. 618, a leading case; and in conflict with the *Bank of America* case (C.A. 9) cited supra, and *DeMoss* v. *Economy F. & C. Company*, 74 Mo. App. 117, 122-124, by

allowing respondent to betray its obligations to petitioner in permitting respondent to change from a position under the surrender agreement to a position where respondent was allowed to assert, and the Court considered, an automatic rejection of the lease at bar under said section 70(b) despite said agreement and after petitioner and respondent had performed the agreement involved in its former position and respondent had received full benefits therefrom (Appendix p. A5, note 3).

The Court of Appeals then ruled there was an automatic rejection of the lease at bar under Section 70(b) and by allowing respondent the changed position the Court of Appeals *disregarded* respondent's former position; *disregarded* respondent's acts and conduct in inducing petitioner not to sell bankrupt's assets immediately, as was intended (R. 58-67) and to enter into the agreement at bar, which both parties performed by petitioner's surrender of the leased premises to respondent and respondent's acceptance thereof when respondent obtained a desired tenant for the leased premises (Questions Presented I(a), supra, and Appendix p. A5, note 3); *disregarded* petitioner's and respondent's Stipulation, filed June 19, 1963 (R. 101, 103, 113, quoted supra) wherein it was agreed: that petitioner *surrendered* the leased premises to and the same was retaken by respondent on March 19, 1962; and that petitioner had exclusive right to possession of bankrupt's *assets and property* (R. 101), and *disregarded* respondent's written and repeated admissions and acknowledgments that the lease at bar was *terminated on March 19, 1962* (R. 14, 113); all of which disregarded matters established: (a) that under *Ten Six Olive, Inc.*, v. *Curby*, 208 F. 2d 117, 123 (C.A. 8), respondent "did not want to treat the lease as having been terminated either by its terms or terminated by the bankruptcy statute, but chose to acknowledge the continued

existence of (the lease)" and that respondent "must be deemed to have waived its right to have (the lease) terminated and to have become bound by its course of conduct" (cases cited Questions Presented I(a); and established (b) that by its said conduct respondent also waived its right to require compliance with the terms and provisions of said lease itself (cases cited Questions Presented I(c). The Supreme Court in the *Dickerson* case, cited and quoted supra, has said that *"Such a change of position is sternly forbidden * * * This remedy (estoppel) is always so applied as to promote the ends of justice"*.

By reason of the changed position theory, adopted by the District Court and affirmed by the Court of Appeals, the instant opinion (Appendix pp. 1A-5A) conflicts with the Supreme Court's aforesaid *Dickerson* opinion (cited supra) and by considering said changed position and by disregarding of respondent's former position and the circumstances thereof, the Court of Appeals erroneously affirmed the reversal of the Referee's order directing respondent to turn over the instant lease deposit to petitioner.

3. The principle here involved is of great public importance in that the Court of Appeals (8th Cir.) in the case at bar, has decided an important question of federal (bankruptcy) law which has not been but should be settled by the Supreme Court and because the Court of Appeals (8th Cir.) in the instant (1968) Per Curiam opinion (Appendix pp. A1-A5) has now rendered a decision in conflict with the decisions of other Courts of Appeal and its own prior decisions on the same matter, namely: *Larkin* v. *Sills, Tr.*, 377 F. 2d 1, 3, pars. 4-5-6 (C.A. 5 1967); *In re Sound, Inc.*, 171 F. 2d 253, 254, pars. 1, 2 (C.A. 7, 1948); *Ten-Six Olive, Inc.*, v. *Curby*, 208 F. 2d 117, 123, 124 (C.A. 8, 1953) and *Entin* v. *Stevens, Tr.*, 323 F. 2d 894, 898, pars. 1, 2, 899, par. 3 (C.A. 8, 1963).

The instant Eighth Circuit opinion lends for confusion under which the general public, all creditors in any and all bankruptcy proceedings, all courts of bankruptcy and all practitioners in said courts lack understanding as to what right a lessor has with respect to an unexpired real estate lease and what rights the trustee has under Section 70(b) of the Bankruptcy Act; said confusion requires clarification as to whether such lessor may waive the right accorded him by said section as ruled by the above cited prior cases and whether the trustee (and such lessor) is bound by the strict, rigid, limited, stringent and unbending interpretation of Section 70(b) to the effect that there is a conclusive presumption of automatic rejection after the 60 day period mentioned in Section 70(b) disregarding all circumstances, as now announced by the Court of Appeals (8th Cir.) in the instant case for the first time *regardless* of the best interests of and benefits to the bankruptcy estate and the creditors thereof by impairing the bankruptcy court's power to consider circumstances which indicate such benefits (R. 60) and establish that such lessor "did not want to treat the lease as having been terminated either by its terms or by the bankruptcy statute, but chose to acknowledge the continued existence of (the lease)" whereby respondent "must be deemed to have waived its right to have (the lease) terminated and to have become bound by its course of conduct" as stated in *Ten-Six Olive, Inc.*, cited supra, and as was the prior existing law.

ARGUMENT

In support of the reasons relied on for the allowance of the requested writ, petitioner submits:

1. That under the uncontroverted and undisputed evidence and facts set forth in Questions Presented I, subdivisions (a) through (e) and the controlling Missouri law

cited therein, there was a valid surrender, accepted by respondent, of the leased premises by which the lease became extinct and was extinguished as though never written.

Replying to respondent's contention that under the Missouri Statute of Frauds petitioner could make no surrender agreement which was not in writing (R. 33, 121), petitioner states that such is not the Missouri law.

In *Tobener* v. *Miller*, 68 Mo. App. 569, 571 (K.C.C.A.), the court considered a similar contention under somewhat similar facts to those at bar. At page 571, the court summarized the facts thus: "that there was substantial evidence *tending* to prove the surrender of the lease; that in pursuance of an oral agreement the property was * * * turned over to and accepted by the plaintiff (landlord) but (plaintiff) contends that such parol surrender of a written lease was void under the statute of frauds." In ruling, the court (l.c. 571) said:

> "The point is not well taken. While a verbal agreement *for* a surrender could not be enforced, yet when said agreement had been *acted upon* and *performed* there arose a surrender *by operation of law*, and plaintiff was thereafter estopped from claiming any longer under the lease; in other words, 'an executed parol agreement to surrender is operative as a surrender' " (citing cases) (emphasis by the court).

To the same effect is *Wahl* v. *Hinchey*, 72 S. W. 2d 497, 499 (Mo. App.), where the court ruled (l.c. 499, pars. 3, 4):

> "that although a verbal agreement for the surrender of a lease may not be enforceable under the statute (of frauds), yet, if such agreement is acted upon and carried through *by acceptance of the abandonment on the part of the landlord such perfected agreement will be binding*" (citing) (emphasis ours).

From the record set out in Questions Presented I, sub. (a) through (e), petitioner submits that the following language and the conclusion in *Ten-Six Olive* (l.c. 122, par. 5) cited supra, has application and is pertinent, to-wit:

> *"the re-entry by appellant (landlord) and the failure to notify bankrupt that the attempts to secure a new tenant were being made in an effort to mitigate damages, present a course of conduct and circumstances which support the finding of surrender and acceptance by operation of law and conversely militate against a conclusion that there was a rejection attributable to the trustee and re-entry pursuant to the rejection. Further, the circumstances enumerated above tend to establish that the re-entry was voluntarily made by appellant (landlord) for its benefit and not bankrupt's. The referee's finding is sufficiently supported by the evidence."* (emphasis ours).

In *Jennings* v. *First National Bank of Kansas City*, 30 S. W. 2d 1049, 1052 (Mo. App.), the court discusses *Von Schleinitz* v. *North Hotel Co.*, 23 S. W. 2d 64, 82 (Mo. App.), and states that in *Von Schleinitz* there was a surrender of the lease premises. The lease deposit there "was to be applied upon the last rental to accrue under said lease." In ruling the court there (l.c. 1052) spoke of the *Von Schleinitz* opinion thus:

> "The landlord accepted the surrender before any rent to which the deposit was to be applied was due. *The Supreme Court held the lessee was entitled to the deposit because the rent to which it was to be applied never became due."* (emphasis ours).

Petitioner submits: that petitioner retained possession of the leased premises until March 19, 1962, upon the terms of the surrender agreement; that said surrender agreement was made shortly after bankruptcy and long before the expiration of the 60 day period set out in section

70(b); that said surrender agreement is not bankrupt's executory contract existent at bankruptcy but instead is a contract made *after* bankruptcy by a court officer, and not the bankrupt, to which section 70(b) does not apply.

Said surrender agreement is separate and apart from and independent of and not under or governed by the provisions of the lease. While the $6,000.00 lease deposit was made in compliance with the lease (R. 85) the effect of the independent surrender agreement is governed by the Missouri law on surrenders (cited Questions Presented I(a)) and not under the terms and provisions of the lease or the law construing leases.

2. That respondent understood the agreement, at bar, was for a surrender when respondent obtained a desired tenant clearly appears in its claim, filed May 11, 1962 (R. 11-14) where respondent claims rent and expense for the period *after* bankruptcy to March 19, 1962 and prorates the rent and expenses claimed for that period on the basis of the aforementioned lease twice stating that said proration is *"Allocation to termination of lease March 19, 1962"* (R. 14). Clark S. Rhoden, respondent's vice president, under oath swears that said statement, quoted supra, is true (R. 13).

Petitioner's and respondent's understanding of said agreement also appears from the Stipulation, filed June 19, 1963 (R. 100-119), in which they agreed (R. 101) that:

> "the Receiver herein and later the Trustee herein, took possession of the premises on December 28, 1961 and remained in possession thereof until March 19, 1962, at which time *the premises were surrendered to and retaken by Broadway Valentine Center, Inc.* Said Trustee had the exclusive right to possession of all bankrupt's assets and property as of the date of said adjudication."

The Stipulation continues (R. 102, 103):

> "that if *bankrupt* had remained in possession of the premises until March 19, 1962, it would have owed respondent the sum of $3,241.90 which amount respondent claims *under the provisions of said lease;* and that 'The computation for said amount is set forth in "Exhibit 3" which is attached hereto and incorporated herein' (R. 103). In Exhibit 3 (R. 113) respondent repeats that proration there shown is *'Allocation to termination of lease March 19, 1962'*".

From the foregoing it is apparent that respondent knew the import of its agreement with petitioner. In disregarding respondent's position under the surrender agreement as stated supra (Questions Presented I, sub. (e)), respondent was allowed to change therefrom to an entirely new position—that there was an automatic rejection of the lease under Section 70(b)—which new position the Court of Appeals ruled completely disregarding the uncontroverted and undisputed facts mentioned supra (Questions Presented I, subs. (a), (d) and (e)). Said ruling by the Court of Appeals conflicts with *Dickerson* v. *Colgrove*, 100 U.S. 578, 580, 25 L. Ed. 618, and other supporting cases cited in Questions Presented I, sub (e).

3. The instant decision conflicts with the decisions of other Courts of Appeal and with the prior existing law of the Eighth Circuit (cases cited in Reasons Relied On For Granting The Writ No. 3), supra. For emphasis petitioner refers to *Ten-Six Olive, Inc.*, v. *Curby*, 208 F. 2d 117, 123, 124 (C.A. 8, 1953), where the Eighth Circuit ruled a situation similar to that at bar; also discusses *Wiemeyer* v. *Koch*, (C.A. 8), 152 F. 2d 230, 234 (on which the District Court relied) and in distinguishing the *Wiemeyer* case the Eighth Circuit states the existing law

prior to the instant decision. At pages 123, 124, pars. 11-13 of *Ten-Six Olive, Inc.*, that court said:

> "It is true, as appellant contends, this court in Wiemeyer v. Koch, 8 Cir., 1945, 152 F.2d 230, held that where no affirmative action is taken by the reorganization trustee within 60 days to adopt or reject the lease, the statutory presumption of rejection is conclusive.
>
> But if it be conceded that a statutory rejection of the leases in the present case could be inferred on the date the petition for reorganization was filed, March 18, 1949, it is evident that appellant waived its right to claim the benefit of such rejection by accepting monthly payments in accordance with the leases from the organization trustee, and later the trustee in bankruptcy during the entire period from March 18, 1949 to August 19, 1950. Under the provisions of the lease, appellant had the option to terminate the lease if lessee became insolvent or bankrupt. (At bar see R. 80, par. 35; R. 79, 80, par. 3). It chose not to do so. Forfeiture provisions are inserted in leases for the benefit of the landlord and may be waived (citing). * * *
>
> *Likewise, the 60 day limitation period of Section 70, sub b, was also inserted in the statute for the benefit of lessor (citing). We see no reason why the lessor may not also waive the right accorded him by the terms of this statute. It is undisputed in the record that appellant indicated by its acts and conduct that it considered the lease to be in full force and effect long after the petition for reorganization was filed. Since appellant did not want to treat the lease as having been terminated either by its terms or by the bankruptcy statute, but chose to acknowledge the continued existence of it, it must be deemed to have waived its right to have it terminated and to have become bound by its course of conduct."* (Italics and parentheses furnished).

CONCLUSION

For the reasons herein set out, petitioner respectfully prays that the court grant the requested writ of certiorari.

Respectfully submitted,

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